

No. PD-1319-19

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
9/29/2020
DEANA WILLIAMSON, CLERK

CARLOS LOZANO

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

**STATE'S RESPONSE TO APPELLANT'S MOTION TO SET BAIL
FOLLOWING REVERSAL ON APPEAL**

COMES NOW, the State of Texas, appellee, in the above-styled cause, and files this, the State's response to appellant's motion to set bail following reversal on appeal, and would show the Court as follows:

I. Procedural history

On October 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed appellant's conviction for murder and remanded the case to the trial court. *See Lozano v. State*, No. 08-17-00251-CR, 2019 WL 5616975 (Tex.App.–El Paso Oct. 31, 2019, pet. granted)(not designated for publication). After the Eighth Court's denial of the State's motion for rehearing on December 11, 2019, the State timely filed its petition for discretionary review on January 31, 2020, and filed its PDR brief on June 18, 2020. On September 14, 2020, appellant

filed his motion for bail pending appeal, specifically requesting that bail be set at an amount no greater than \$50,000. For the following reasons, the State requests that bail be set at an amount no less than \$100,000, which is no greater than his pretrial bail amount. *See* (CR1: 89¹ – pretrial order reducing bond).²

II. Analysis

The main objective of an appeal bond is to secure the appellant's apprehension if his conviction is subsequently reinstated or affirmed. *See Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex.Crim.App. 1981); *see also* TEX. CRIM. PROC. CODE art. 44.04(h). Generally, the primary factors to consider when determining what constitutes reasonable bail pending an appeal are the nature of the offense and the circumstances surrounding its commission and the length of the sentence. *See Ex parte Rubac*, 611 S.W.2d at 849; *Werner v. State*, 445 S.W.3d 301, 305-06 (Tex.App.–Houston [1st Dist.] 2013, no pet.). Other factors to consider in setting bail include: (1) the future safety of any victims of the offense and the community,

¹ Throughout this response, references to the record will be made as follows: references to the clerk's record will be made as "CR" and volume and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

² In the pretrial order reducing bond, the trial court reduced the initial bond set by the jail magistrate of \$500,000 to a cash/corporate surety and personal recognizance bond of \$100,000. (CR: 89).

(2) appellant's work record, (3) appellant's community and family ties, (4) appellant's length of residency, (5) appellant's ability to make bail, (6) appellant's prior criminal record, (7) appellant's conformity with previous bond conditions, (8) the existence of other outstanding bonds, and (9) the aggravating circumstances involved in the offense. *See Ex parte Rubac*, 611 S.W.2d at 849-50; *Werner*, 445 S.W.3d at 305-06.

A. Nature of the offense and the circumstances surrounding its commission and the length of the sentence

The evidence presented at trial demonstrates that on September 26, 2015, the belligerent and angry appellant murdered Jorge Hinojos, who was unarmed, by shooting him three times after a verbal and physical confrontation in the parking lot of Pockets Billiards. (RR7: 66-69, 96, 98-102, 114, 157-58; RR8: 40-41, 47-49, 53, 55, 95-96). Immediately after the shooting, appellant fled to Mexico. (RR7: 69; RR8: 178-80; SX 151-52). Appellant remained in Mexico, evading arrest until January 7, 2016, when he surrendered himself to U.S. authorities. (CR2: 752). After a jury trial, appellant was convicted of murder and sentenced to confinement for 25 years in the Texas Department of Criminal Justice Institutional Division. (CR2: 796-97; RR10: 81; RR11: 19).

B. Criminal history and extraneous offenses

Contrary to appellant's assertions in his motion, appellant does have a criminal history, as well as a history of violent behavior and an inability to follow the rules:

1. On or about 02/26/14, in the Las Cruces District Court, Las Cruces, New Mexico, under case number D-307-CR-201200568, appellant was convicted of Driving with License Invalid. (CR2: 752).
2. On or about 09/30/10, in the Las Cruces Magistrate Court, Las Cruces, New Mexico, under case number M-14-DR-201000799, appellant was convicted of Aggravated Driving While Intoxicated (0.16 or More). (CR2: 752).
3. On or about 12/05/00, in Las Cruces, New Mexico, appellant was charged with Negligent use of a Deadly Weapon. He was found guilty of this offense on 08/24/01 in the Las Cruces Magistrate Court under cause number M-14-DR-200100218. (CR2: 753).
4. On or about 07/25/15, in the County of El Paso, Texas, appellant was issued a traffic citation for Speeding. Appellant was traveling at 78 mph in a 65 mph zone on Loop 375 South, mile post 27. Citation T4253257. (CR2: 752).
5. On or about 08/14/11, appellant drove to a residence in Las Cruces, New Mexico, asking to see Armando Gardea. Upon being told that Armando Gardea was not home, appellant proceeded to exit his vehicle, walk to the trunk of his car, took out a box where he retrieved a handgun. Appellant loaded a magazine into the handgun, racked it as if ready to shoot, and then drove off. Said offense or bad act is documented in case report DASO201108556. (CR2: 752).
6. On or about 08/28/07, in the Las Cruces Magistrate Court, appellant was charged with Assault Against a Household Member. This offense

was dismissed on 01/02/08 under case number M-14-VR-200700329. (CR2: 752-53).

7. On or about 08/12/07, in Mesquite, New Mexico, appellant recklessly operated a motor vehicle in pursuit of Jessica Salinas. Appellant tailgated her and threatened to crash into her vehicle if she did not pull over. Upon coming to a stop, appellant exited his vehicle brandishing a handgun. Salinas was able to drive away but appellant continued the pursuit until she reached her home and called 911. Said offense or bad act is documented in case number D200707413. (CR2: 753).
8. While incarcerated at TDCJ, appellant has also been cited with numerous disciplinary violations: possession of a cell phone, violation of a written/posted rule, and soliciting a person to violate policy.

Appellant's convictions, extraneous offenses, and disciplinary violations reflect his inability to abide by the rules of a civilized society. Furthermore, appellant's failure to follow the rules makes it likely that he will be unable to respect the conditions of an appeal bond unless an appropriately high amount of bail is set. Finally, appellant's above-reported transgressions, especially his propensity to brandish firearms in an effort to intimidate others, also warrant the setting of a high amount of bail.

C. Appellant's work record, community and family ties, length of residency, ability to make bail, and conformity with previous bond conditions

Contrary to appellant's assertion that he is a lifelong resident of El Paso, Texas, his criminal history and extraneous offenses suggest that he has spent at least a portion of his life residing in New Mexico. Appellant also presents no documentary proof of his alleged lifelong El Paso residency, nor that he has extended family in El Paso. Appellant also fails to present any documentary proof that his mother is in fact disabled, that she lives in El Paso, and that he can reside at her residence (assuming she does, in fact, reside in El Paso). Appellant's claim that he is the sole support and care giver for his mother is also not supported by any evidence. Appellant has been incarcerated for the past 4 years, such that it is unlikely that his claim of support and care giving can currently be true. With respect to appellant's work history, as discussed below, he presents no documentary proof of his stated profession or work history.

Given appellant's failure to show significant ties to the community, his failure to show past and future gainful employment, and his documented ability to stay in Mexico for over 3 months, the appellant is a significant flight risk, which warrants the setting of a high amount for bail. *See Ex parte Gonzalez*, 383 S.W.3d 160, 165-66 (Tex.App.—San Antonio 2012, pet. ref'd)(upholding a \$1,500,000

bond on a capital-murder charge based partly on appellant's connections to a foreign country and knowledge of other states where he had worked and on the absence of any witness to attempt to guarantee his appearance); *Ex parte Brown*, No. 05-00-00655-CR, 2000 WL 964673 at *2 (Tex.App.–Dallas, July 13, 2000, no pet.)(not designated for publication)(upholding a \$1,000,000 bond based partly on appellant's failure to present testimony regarding his work record, his community ties, or the length of his residency in Texas). These reasons also warrant setting a sufficiently high amount of bail.

D. The future safety of the community and flight risk

Given appellant's documented history of shooting an unarmed man three times, his propensity towards brandishing firearms in public, criminal history, and general inability to follow the rules, appellant presents a danger to the community, especially if angered or confronted. Furthermore, given that appellant initially fled to Mexico and remained there for over 3 months prior to turning himself in, and in light of the fact that he faces the remainder of his 25 year sentence if his conviction is affirmed, he presents a significant flight risk. (CR2: 796-97). Finally, should this Court affirm the Eighth Court's opinion overturning appellant's conviction, the State will retry appellant for murder, and if convicted again, he will face a sentence of up to 99 years. For this reason as well, appellant presents a

significant flight risk. These reasons also warrant setting a sufficiently high amount of bail.

E. Appellant's ability to make bond

In his motion, appellant asks for a \$50,000 bond. However, beyond the conclusory statement that he “can make a \$50,000 bail,” appellant makes absolutely no showing as to his ability or inability to make bail. *See* (appellant's bail motion at 3). Appellant also claims to hold a certificate as “Master Mechanic” and claims to have been employed since graduating high school, but he presents no documentary evidence regarding the current state of his finances, including information regarding his employment history, bank accounts, property interests, potential cash reserves, etc. *See* (appellant's bail motion at 3-4).

Consequently, there is nothing in the record showing whether bail in the amount of \$50,000 imposes a sufficient inducement on appellant to appear in court, especially when he has not indicated the assets at risk. For example, if the assets belong to family members, and are not his own, this may provide appellant with little to no incentive to appear at trial. *See Ex parte Gonzalez*, 383 S.W.3d at 165-66 (upholding a \$1,500,000 bond based partly on the absence of evidence concerning appellant's ability to make bond); *Ex parte Saldana*, Nos. 13-01-360-CR, 13-01-361-CR, 2002 WL 91331 at *5 (Tex.App.—Corpus Christi, Jan. 24,

2002, no pet.)(not designated for publication)(noting that if appellant failed to appear at trial, it was his family's assets and savings that were at risk, rather than his own, which may provide appellant with little or no incentive to appear at trial). These reasons also warrant setting a sufficiently high amount of bail.

III. Conclusion

Given appellant's criminal history, history of brandishing firearms and violating the rules, his failure to provide documentary proof of ties to the community and work history, and his demonstrated risk of flight, the State asks that any bond set by this Court should not be less than the \$100,000 bond as originally set by the trial court.

PRAYER

WHEREFORE, the State prays that this Court sets the appellant's bail at an amount no less than \$100,000.

Respectfully submitted,

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DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

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ATTORNEYS FOR THE STATE

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on September 28, 2020, a copy of the response was sent by email, through an electronic-filing-service provider, to appellant's attorney: Kenneth Del Valle, kendelvalle@aol.com.

(2) The undersigned also does hereby certify that on September 28, 2020, a copy of the response was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ronald Banerji

RONALD BANERJI

Automated Certificate of eService

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